A

PP v. CHO SING KOO & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
B [CRIMINAL APPEAL NO: W-09-94-03-2013]
1 OCTOBER 2014

CRIMINAL LAW: *Penal Code – Section 409 – Criminal breach of trust – Directors of company gave oral instruction to prepare payment vouchers to unauthorised*
C *individuals – Whether directors had power and control over company's funds – Whether directors held dominant position – Whether directors could give oral instructions to issue payment vouchers due to company's stringent procedure – Whether presumption under s. 409B(1)(b)(ii) Penal Code rebutted – Whether prima facie case established*

D ***EVIDENCE:*** *Witness – Credibility of – Whether truthful witness – Whether evidence corroborated – Whether interested witness – Whether discrepancies arose in witness's evidence – Whether related to trivial matters – Whether testimony of witness passed test of probability*

E ***CRIMINAL PROCEDURE:*** *Appeal – Witness's credibility – Whether matter to be decided by trial court – Whether appellate court interfered with trial court's findings of fact since it was perverse and could not be supported*

The respondents were charged with offences which were punishable under s. 409 of the Penal Code. The facts showed that until their resignations, the
F respondents were directors of Ganad Media Sdn Bhd ('Ganad Media') which was a subsidiary of Ganad Corporation Bhd and PW2 was the chief executive officer. As directors of the company, the respondents were signatories to the bank accounts of Ganad Media. *Vide* the testimony of PW20, who was an acquisition manager in Ganad Media, the prosecution submitted that it was
G the respondents who instructed her to prepare payment vouchers for the sum of RM85,000 to certain individuals. These payouts, as contended, were payments for the rentals by Ganad Media to the land owners in the course of carrying out their business of outdoor billboard advertising. It was argued that these individuals were fictitious land owners as they were not parties to
H the contract which Ganad Media had with the actual land owners on whose lands the advertising billboards were erected. PW20 further testified that the respondents had instructed her to prepare the payment voucher for the sum of RM6,500 to one Ibrahim who was a stranger to the rental contract between Ganad Media and the land owner. It was also alleged that the second respondent was one of the signatories to the cheque that was paid out to the
I said Ibrahim. At the close of the prosecution case, the Sessions Court Judge found that no *prima facie* case had been made out against the respondents and as a result, they were acquitted and discharged without their defence being called. The trial court ruled that the respondents did not have exclusive

power or dominion over Ganad Media's funds as such power was in the hands of PW2 since he was the most powerful person in Ganad Media. Further, the trial judge found PW20 to be an untruthful witness. Dismissing the prosecution's appeal, the High Court decided that the manner in which the activities of Ganad Media were carried out would preclude any other person from having control over the company's funds and affairs without the knowledge and approval of PW2. Hence, this appeal.

Held (allowing appeal; remitting case to Sessions Court for the respondents to enter their defence)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The respondents were agents of Ganad Media within the meaning of s. 402A of the Penal Code and were entrusted with or had dominion over the company's funds. The respondents' act of disposing of the company's funds in violation of the rental contracts which Ganad Media had with the land owners in their capacity as agents of the company fell within the ambit of the second limb of s. 409B(1)(b)(ii). The sums of RM85,000 and RM6,500 were meant for the actual owners of the lands and not for strangers or non parties to the contracts. By making the unauthorised payments, the respondents were in violation of the legal contracts touching the discharge of the company's funds. (paras 5 & 14)

(2) *Vide* s. 409B(1)(b)(ii) of the Penal Code, the respondents were presumed to have acted dishonestly when they caused payments to be made to the unauthorised individuals. It behooves the respondents to therefore adduce evidence to rebut the presumption on a preponderance of probability and this could only be done if they were to enter their defence. Besides, no evidence was adduced to show that (i) PW2 knew about the unauthorised payments; and (ii) the respondents had obtained PW2's approval prior to making the payments. (paras 15 & 19)

(3) In a prosecution under s. 409 of the Penal Code, it was sufficient for the prosecution to prove dominion by establishing control or power of disposal over the property. There was no requirement to prove dominion to the exclusion of all other persons. Being the directors of Ganad Media and having the power to sign the company's cheques, the respondents had control and power of disposal over the company's funds. The fact that there were others in the company who had power to sign the company's cheques did not dilute the respondents' control and power of disposal over the funds. Further, it is not a defence to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of the company. (paras 17 & 18)

(4) The credibility of a witness is primarily a matter for the trial court to decide. The appellate court will always be slow to interfere with findings of fact made by the trial court where such findings depended on

A the credibility of the witnesses. However, the appellate court can and will interfere if the trial court's finding of fact is perverse and could not be supported having regard to the evidence or was against the probabilities of the case. (para 22)

B **(5)** In finding PW20 to be an untruthful witness, the trial judge's opinion was influenced and shaped by the following factors, *ie*, (i) that PW20's evidence was not corroborated by independent evidence; (ii) PW20 was an interested witness; and (iii) there were discrepancies in the evidence of PW20. PW20 was not an accomplice or *particeps criminis*, whose evidence required independent corroboration. Even C then, the requirement of corroboration in such cases was more a matter of prudence rather than a strict requirement of law. PW20 was also not a child witness. As such, it was wrong for the trial judge to require corroboration when none was required by law. (paras 23 & 24)

D **(6)** There is no law to say that the evidence of an interested witness must not be believed. Nothing can be more repulsive than for a witness to lie under oath in order that the accused may be convicted for the offence charged. Such witness is liable to contempt proceedings or to prosecution for perjury under s. 195 of the Penal Code. The court should only make such finding on any witness upon clear proof and on being E satisfied that the witness had deliberately lied. In relation to the finding that PW20 was an interested witness, the trial judge had given undue and unwarranted weight to the fact that PW20 was given a double promotion and triple pay which was a reward for giving evidence against the respondents. This was pure conjecture and should not have been made, F particularly in the face of the evidence that PW20's promotion was due to the outflow of key employees at the material time. (paras 25 & 26)

(7) As for the discrepancies and lapses of memory within and between the testimonies of PW20 and some other prosecution witnesses, it related to insignificant and trivial matters such as, *inter alia*, the actual date PW20 G was appointed as the acquisition manager and the details pertaining to the preparation of the payment vouchers. Discrepancies such as these should be ignored as more often than not, they are a result of honest mistakes or lapses in memory rather than falsehood. The witnesses were recalling events that took place long before they were called to give H evidence. It is only when a witness has demonstrably and undoubtedly lied on material points that his evidence must be treated with caution or discarded altogether. (paras 27 & 28)

(8) In order to determine whether a witness is telling the truth or otherwise on any material issue, the best guide is for the court to see whether his I testimony passes the test of probability. On the facts, there was nothing inherently improbable in PW20's testimony that it was the respondents who orally instructed her to prepare the payment vouchers. The fact that

stringent procedures were in place in Ganad Media for the approval and issuance of payment vouchers did not mean that the respondents could not issue the instructions orally, given their dominant positions as company directors. (paras 29 & 30)

(9) PW20's evidence did not stand alone. It was supported by the documentary evidence and the surrounding circumstances. For the payments to be made, someone in authority in Ganad Media must have given the instructions. Having regard to the totality of the evidence and the probabilities of the case, PW20 could not have been lying when she said that it was the two respondents who gave the oral instructions. The trial judge was no doubt in a better position to judge PW20's credibility as a witness but her rejection of PW20's evidence on the premise that the respondents had no opportunity to give the oral instructions due to the company's stringent procedure in approving payment vouchers was perverse and did not stand up to reasons. (paras 32 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden telah dipertuduh dengan kesalahan yang boleh dihukum di bawah s. 409 Kanun Keseksaan. Fakta menunjukkan bahawa sebelum mereka meletak jawatan, responden-responden merupakan pengarah-pengarah Ganad Media Sdn Bhd ('Ganad Media') yang merupakan anak syarikat Ganad Corporation Bhd dan PW2 adalah ketua pegawai eksekutif. Sebagai pengarah-pengarah syarikat tersebut, responden-responden adalah penandatangan akaun bank Ganad Media. Melalui keterangan PW20, yang merupakan pengurus perolehan di Ganad Media, pihak pendakwaan menghujahkan bahawa responden-responden telah mengarahkan PW20 untuk menyediakan baucer bayaran bagi jumlah RM85,000 kepada beberapa individu. Bayaran ini, dihujahkan, merupakan bayaran sewa oleh Ganad Media kepada pemilik tanah bagi tujuan menjalankan perniagaan pengiklanan pada papan iklan. Adalah dihujahkan bahawa individu-individu ini merupakan pemilik tanah rekaan memandangkan mereka bukanlah pihak kepada kontrak yang dimasuki antara Ganad Media dengan pemilik tanah sebenar di mana tanah mereka telah digunakan untuk mendirikan papan iklan tersebut. PW20 juga memberi keterangan bahawa responden-responden telah mengarahkannya untuk menyediakan baucer bayaran untuk jumlah RM6,500 kepada Ibrahim bin Jonid yang merupakan orang asing kepada kontrak sewa antara Ganad Media dan pemilik tanah. Dinyatakan bahawa responden kedua merupakan salah seorang penandatangan cek yang dibayar kepada Ibrahim. Di akhir kes pendakwaan, Hakim Mahkamah Sesyen mendapati bahawa tiada kes *prima facie* dibuktikan terhadap pihak responden dan oleh itu, mereka telah dilepaskan dan dibebaskan tanpa dipanggil untuk membela diri. Mahkamah bicara memutuskan bahawa responden-responden tidak

mempunyai kuasa eksklusif atau kuasa terhadap dana Ganad Media memandangkan kuasa tersebut terletak dalam tangan PW2 kerana dia merupakan orang yang paling berkuasa di Ganad Media. Tambahan lagi, hakim bicara mendapati bahawa PW20 bukanlah seorang saksi yang bercakap benar. Menolak rayuan pihak pendakwaan, Mahkamah Tinggi memutuskan bahawa cara aktiviti-aktiviti dijalankan di Ganad Media akan mengecualikan orang lain daripada mempunyai kawalan terhadap dana dan hal ehwal syarikat tanpa pengetahuan dan kebenaran PW2. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengembalikan kes ke Mahkamah Sesyen untuk responden-responden memasuki pembelaan mereka)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Responden-responden adalah ejen Ganad Media dalam erti kata s. 402A Kanun Keseksaan dan telah diamanahkan dengan atau mempunyai kuasa terhadap dana syarikat tersebut. Tindakan responden melupuskan dana syarikat dengan melanggar kontrak sewa antara Ganad Media dan pemilik-pemilik tanah dalam kapasiti mereka sebagai ejen syarikat terjumlah di bawah cabang kedua s. 409B(1)(b)(ii). Jumlah RM8,500 dan RM6,500 bertujuan untuk pemilik sebenar dan bukannya untuk orang asing kepada kontrak tersebut. Dengan membuat bayaran yang tidak dibenarkan, responden-responden telah melanggar kontrak undang-undang yang menyentuh pelepasan dana syarikat.

(2) Melalui s. 409B(1)(b)(ii) Kanun Keseksaan, responden-responden dianggap telah bertindak dengan tidak jujur apabila bayaran dibuat kepada individu-individu yang tidak dibenarkan. Oleh itu, responden-responden perlu mengemukakan keterangan untuk mematahkan anggapan tersebut atas keutamaan kebarangkalian dan ini hanya boleh dibuat jika mereka memasukkan pembelaan mereka. Di samping itu, tiada keterangan yang dikemukakan untuk menunjukkan bahawa (i) PW2 mempunyai pengetahuan mengenai bayaran yang tidak dibenarkan itu; dan (ii) responden-responden telah memperolehi kebenaran PW2 sebelum membuat bayaran tersebut.

(3) Dalam suatu pendakwaan di bawah s. 409 Kanun Keseksaan, adalah mencukupi untuk pihak pendakwaan membuktikan kekuasaan dengan menunjukkan kawalan dan kuasa melupuskan harta. Tiada kehendak untuk membuktikan kekuasaan tanpa digugat oleh sesiapa pun. Responden-responden, yang merupakan pengarah dan mempunyai kuasa untuk menandatangani cek syarikat, mempunyai kawalan dan kuasa atas pelupusan dana syarikat. Fakta bahawa terdapat orang lain di syarikat tersebut yang mempunyai kuasa untuk menandatangani cek syarikat tidak melepaskan responden-responden dari mempunyai kawalan dan

kuasa untuk melupuskan dana tersebut. Tambahan lagi, ia bukan satu pembelaan untuk menunjukkan bahawa harta itu telah diterima secara terbuka atau pengagihan telah direkod dan dicatatkan dalam buku dan akaun syarikat.

(4) Kredibiliti seseorang saksi adalah suatu perkara yang perlu diputuskan oleh mahkamah bicara. Mahkamah rayuan sentiasa lambat untuk campur tangan dengan dapatan fakta yang dibuat oleh mahkamah bicara di mana dapatan tersebut bergantung kepada kredibiliti saksi-saksi. Walau bagaimanapun, mahkamah rayuan boleh dan akan campur tangan jika dapatan mahkamah bicara bertentangan dan tidak disokong berdasarkan keterangan atau bertentangan dengan kebarangkalian kes itu.

(5) Dalam mendapati bahawa PW20 adalah seorang saksi yang tidak bercakap benar, hakim bicara telah dipengaruhi oleh faktor-faktor berikut, iaitu, (i) bahawa keterangan PW20 tidak disokong oleh keterangan bebas; (ii) PW20 adalah saksi yang mempunyai kepentingan; dan (iii) terdapat percanggahan dalam keterangan PW20. PW20 bukanlah rakan sejenayah atau pun *particeps criminis*, di mana keterangan dia memerlukan sokongan bebas. Walaupun begitu, kehendak sokongan dalam kes-kes sebegitu adalah lebih kepada langkah berjaga-jaga dan bukannya kehendak ketat di bawah undang-undang. PW20 juga bukanlah seorang saksi kanak-kanak. Oleh itu, adalah salah untuk hakim bicara menghendaki keterangan sokongan apabila undang-undang tidak memerlukannya.

(6) Tidak ada undang-undang untuk menyatakan bahawa keterangan seorang saksi yang mempunyai kepentingan tidak boleh dipercayai. Tiada apa-apa yang lebih memudaratkan bagi seorang saksi, yang telah mengangkat sumpah, untuk menipu supaya tertuduh disabitkan atas kesalahan yang dipertuduh ke atasnya. Saksi sebegitu boleh dikenakan prosiding penghinaan atau pendakwaan untuk sumpah bohong di bawah s. 195 Kanun Keseksaan. Mahkamah hanya boleh membuat dapatan sedemikian terhadap seseorang saksi apabila terdapat bukti jelas dan berpuas hati bahawa saksi tersebut telah menipu dengan sengaja. Berkenaan dapatan bahawa PW20 adalah saksi berkepentingan, hakim bicara telah meletakkan beban yang tidak wajar kepada fakta bahawa PW20 telah dinaikkan pangkat dan diberi gaji tiga kali ganda yang merupakan ganjaran kerana memberi keterangan terhadap responden-responden. Ini merupakan suatu andaian semata-mata dan sepatutnya tidak dibuat, terutamanya berdasarkan keterangan yang jelas bahawa kenaikan pangkat PW20 adalah disebabkan oleh pengeluaran pekerja-pekerja utama pada masa material.

(7) Bagi percanggahan dan kehilangan ingatan antara keterangan PW20 dan saksi-saksi pihak pendakwaan yang lain, ia adalah berkaitan dengan perkara-perkara tidak penting dan remeh seperti, antara lain, tarikh sebenar PW20 dilantik sebagai pengarah perolehan dan butir-butir mengenai penyediaan baucer bayaran. Percanggahan sebegini boleh diabaikan di mana ia merupakan kesilapan yang tidak disengajakan dan bukannnya suatu kepalsuan. Saksi-saksi perlu mengingat semula kejadian-kejadian yang telah berlaku lama sebelum mereka dipanggil untuk memberi keterangan. Keterangan perlu dipertimbangkan dengan berhati-hati atau diketepikan sama sekali hanya apabila seseorang saksi telah menunjukkan bahawa dia telah menipu atas pekara-perkara penting.

(8) Untuk menentukan sama ada saksi bercakap benar atau sebaliknya berkenaan sebarang isu penting, panduan yang paling baik adalah untuk mahkamah meneliti sama ada keterangannya mengatasi ujian kebarangkalian. Berdasarkan fakta, tiada apa-apa yang mustahil dalam keterangan PW20 bahawa responden-responden yang telah, secara lisan, mengarahkannya menyediakan baucer bayaran. Fakta bahawa terdapat prosedur-prosedur ketat di Ganad Media untuk pengesahan dan pengeluaran baucer bayaran tidak bermakna bahawa responden-responden tidak mengeluarkan arahan secara lisan, memandangkan kedudukan mereka sebagai pengarah syarikat.

(9) Keterangan PW20 bukanlah tanpa sokongan. Terdapat sokongan keterangan dokumentar dan keadaan sekeliling. Untuk bayaran dibuat, arahan telah diberikan oleh seorang yang mempunyai kuasa di Ganad Media. Berdasarkan keseluruhan keterangan dan kebarangkalian kes, PW20 tidak didapati menipu apabila dia menyatakan bahawa kedua-dua responden yang telah memberi arahan lisan. Tidak boleh disangkal bahawa hakim bicara berada dalam kedudukan yang lebih baik untuk menghakimi kredibiliti PW20 sebagai seorang saksi tetapi penolakan keterangan PW20 atas alasan bahawa responden-responden tidak mempunyai peluang untuk memberi arahan lisan disebabkan prosedur ketat dalam syarikat untuk mengesahkan baucer bayaran adalah bertentangan dan tidak bermakna.

Case(s) referred to:
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Sathiadas v. PP [1970] 1 LNS 142 HC ***(refd)***

Legislation referred to:
Penal Code, ss. 195, 402A, 405, 409A, 409B(1)(b)(ii)

For the appellant - Sulaiman Kho Kheng Fui; DPP
For the 1st respondent - Haniff Khatri; M/s Haniff Khatri
For the 2nd respondent - Harcharanjit Singh; M/s Harcharanjit Singh & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Rahman Sebli JCA:

[1] In the Sessions Court the respondents were charged with 14 offences but for purposes of this appeal only the following three charges under s. 409 of the Penal Code are relevant for consideration:

Charge against the first respondent

> Bahawa kamu di antara 10 Mac 2000 hingga 29 Mei 2000 di Ganad Media Sdn Bhd, Tingkat 3, No. 120, Jalan Bukit Bintang, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai agen iaitu Pengarah Ganad Media Sdn Bhd dan di dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas harta tertentu, iaitu dana syarikat tersebut, telah melakukan pecah amanah jenayah berkaitan harta tersebut iaitu wang berjumlah RM85,000.00 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

First charge against the second respondent

> Bahawa kamu pada 7 April 1999, di Ganad Media Sdn Bhd, Tingkat 3, No. 120, Jalan Bukit Bintang, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai agen iaitu Pengurus Grand Media Sdn Bhd dan di dalam kapasiti terebut, diamanahkan dengan penguasaan ke atas harta tertentu, iaitu dana syarikat tersebut iaitu wang berjumlah RM6,500.00 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

Second charge against the second respondent

> Bahawa kamu di antara 10 Mac 2000 hingga 29 Mei 2000 di Ganad Media Sdn Bhd, Tingkat 3, No.120, Jalan Bukit Bintang, di dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dengan Cho Sing Koo (KP: 510417-11-5023) untuk melakukan pecah amanah jenayah berkenaan sesuatu harta tertentu iaitu wang berjumlah RM85,000.00 di mana Cho Sing Koo telah diamanahkan dengan penguasaan ke atas harta tersebut dalam kapasitinya sebagai agen, iaitu Pengarah Ganad Media Sdn Bhd, di mana kesalahan pecah amanah jenayah tersebut telah dilakukan atas sebab persubahatan kamu dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan dibaca bersama seksyen 109 Kanun yang sama.

[2] At the close of the prosecution case, the respondents were acquitted and discharged without their defence being called. The learned Sessions Court Judge found that no *prima facie* case had been made out against either of them. The Public Prosecutor appealed to the High Court against the order of acquittal but their appeal was dismissed. Hence this appeal before us. Having heard arguments from both sides on 23 September 2014 we unanimously allowed the Public Prosecutor's appeal and ordered the case to be remitted back to the Sessions Court for the respondents to enter upon their defence before the same judge. These are our grounds for allowing the appeal.

[3] Leaving out the minute details, the evidence led by the prosecution can be summarised as follows. Until their resignations on 20 June 2000 and 16 May 2000 respectively, the first and second respondents were directors of Ganad Media Sdn Bhd ("Ganad Media") which is a subsidiary of Ganad Corporation Bhd of which Gan Kok Beng (PW2) is the chief executive officer. As directors of the company the respondents were signatories to the bank accounts of Ganad Media.

[4] It is the evidence of PW2 that he had entrusted the daily management of Ganad Media to the first respondent since 1994 and that after the first respondent's discharge as a bankrupt in 1997, he was made the managing director of the subsidiary company. The second respondent was the first respondent's right hand person. Both she and first respondent were responsible for the company's finance and accounts. Prosecution witnesses PW7, PW15, PW16 and PW19 who were employees of Ganad Media confirmed that the company's finances were managed by the two respondents.

[5] On these facts there can be no doubt in our view that the respondents were agents of Ganad Media within the meaning of s. 402A of the Penal Code and were entrusted with or had dominion over the funds of the company, specifically the RM85,000 and the RM6,500 which form the subject matter of the charges against them. The question left to be considered is whether the respondents had committed criminal breach of trust in respect of the property.

[6] The lynchpin of the prosecution's case is the testimony of Yew Hui Mei (PW20). Her position in Ganad Media at the material time was as acquisition manager. Her immediate boss was the first respondent to whom she reported. The crucial part of PW20's evidence in relation to the first and third charges is that it was the two respondents who instructed her to prepare the five payment vouchers (P6, P7, P9, P10, P11) for payment of the RM85,000 to the following individuals:

(a) Nasir bin Abdul Talib (RM36,000 + RM7,000).

(b) Ibrahim bin Jonid (RM10,000).

(c) Kwee Chuan Foong (RM16,000 + RM16,000).

[7] These payouts were purportedly as payments for the rentals of Site No. MLK 0109, Site No. JHR 0074, and Site No. SEL 0676 which Ganad Media rented from the landowners in the course of carrying on their business of outdoor billboard advertising. These individuals were fictitious landowners as they were not parties to the contracts Ganad Media had with the actual landowners on whose lands the advertising billboards were erected. The real landowners (or children of the owners) were called to give evidence and they confirmed that they did not know the recipients of the payments.

[8] The evidence of PW3 and PW7 is that it was the two respondents who signed the "approved" columns of the payment vouchers at P7, P9 and P10 and it was also the two respondents who signed the cheques at P24, P25(a), P29, P32 and P33. All five cheques had been cashed.

[9] With regard to the criminal breach of trust charge against the second respondent the *modus operandi* was identical. The evidence of PW20 is that she was instructed by the respondents to prepare the payment voucher at P8 for payment of the sum of RM6,500 to one Ibrahim bin Jonid who again was a stranger to the rental contract between Ganad Media and the landowner and was not supposed to receive the payment. The RM6,500 was meant for one Jasman bin Jonid, the landowner of the other advertising site. PW7 confirmed that the second respondent was one of the signatories to the cheque that was paid out to Ibrahim bin Jonid.

[10] Criminal breach of trust is defined in s. 405 of the Penal Code as follows:

> 405. Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

[11] By the terms of the provision a person entrusted with property or with dominion over the property commits criminal breach of trust in respect of the property if he does any of the following acts, *viz*:

(a) He dishonestly misappropriates the property; or

(b) He converts the property to his own use; or

(c) He dishonestly uses or disposes of the property in violation of any direction of law prescribing the mode in which such entrustment of the property is to be discharged; or

(d) He dishonestly uses or disposes of the property in violation of any legal contract which he has made touching the discharge of such entrustment of the property;

(e) He wilfully suffers any other person to do any of the above.

[12] The offence does not count as one of its factors, the loss that is the consequence of the act; it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation

of a direction, express or implied, relating to the mode in which the trust is to be discharged: see *Sathiadas v. Public Prosecutor* [1970] 1 LNS 142; [1970] 2 MLJ 241 per Raja Azlan Shah J (as His late Highness then was). In relation to paras. (1), (3), (4) and (5) above, s. 409B(1)(b) of the Penal Code is relevant and stipulates as follows:

> 409B.(1) Where in any proceeding it is proved:
>
> (a) …
>
> (b) for an offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had:
>
> (i) misappropriated that property;
>
> (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
>
> (iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above,
>
> it shall be presumed that he had acted dishonestly until the contrary is proved.

[13] The learned High Court Judge in affirming the order of acquittal held the view that the above statutory presumption has no application as there was no "violation of law" involved. With due respect to the learned judge it appears that she was only focusing her attention on the first limb of sub-para. (1)(b)(ii) without addressing her mind to the second limb.

[14] It is our considered view that the respondents' act of disposing of the company's funds in violation of the rental contracts Ganad Media had with the landowners in their capacity as agents of the company falls squarely within the ambit of the second limb of sub-para. (1)(b)(ii). The RM85,000 and the RM6,500 were meant for the actual owners of the lands and not for strangers or non-parties to the contracts. By making the unauthorised payments, clearly the respondents were in violation of the legal contracts touching the discharge of the company's funds.

[15] Therefore by operation of s. 409B(1)(b)(ii) of the Penal Code the respondents were presumed to have acted dishonestly when they caused payments to be made to the unauthorised individuals. The presumption can of course be rebutted by the prosecution's own evidence but there is none in this case. It behoves the respondents therefore to adduce evidence to rebut the presumption on a preponderance of probability and this can only be done if they were to enter their defence.

[16] In her judgment the learned Sessions Court judge found that the respondents had no exclusive power or dominion over Ganad Media's funds as such power was in the hands of PW2, being the chief executive officer and the "brain and mind" of the company. She described PW2 as the most powerful person in Ganad Media.

[17] The learned Sessions Court Judge used such words as "ekslusiviti dan/atau dominasi", "ekslusif kuasa", "dominasi kuasa penuh", "kuasa ekslusif" in determining whether the respondents had dominion over Ganad Media's funds. We consider this to be a misdirection. In a prosecution under s. 409 of the Penal Code it is sufficient for the prosecution to prove dominion by establishing control or power of disposal over the property. There is no requirement to prove dominion to the exclusion of all other persons.

[18] Being the directors of Ganad Media and having power to sign the company's cheques, clearly the respondents had control and power of disposal over the company's funds. The fact that there were others in the company who had power to sign the company's cheques does not dilute the respondents' control and power of disposal over the funds. The court is not concerned with the power of others over the funds but whether the respondents were actuated by dishonest intention when they disposed of the company's property. Under the law it is not even a defence to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of the company: see s. 409A of the Penal Code.

[19] We are also unable to agree with the learned High Court Judge who affirmed the order of acquittal that the manner in which the activities of Ganad Media were carried out would preclude any other person from having control over the company's funds and affairs without the knowledge and approval of PW2. First of all there is no evidence that PW2 knew about the unauthorised payments and secondly there is no evidence that the respondents had obtained PW2's approval prior to making the payments. Therefore with all due respect to the learned judge, the question of PW2 having approved the payments does not arise.

[20] We shall now deal with the way the learned Sessions Court Judge handled PW20 as a witness. She described PW20's testimony as "penuh dengan kepura-puraan, penipuan dan rekaan" (full of pretence, deceit and inventions). She also found PW20 to be an interested and bias witness. By using such strong words against PW20 it is fair to assume that in the mind of the learned Sessions Court Judge PW20 was incapable of telling the truth and would lie at the drop of a hat.

[21] Her finding in relation to the evidence of PW20 is that there was no opportunity for the respondents to have given the oral instructions to PW20 in view of the stringent procedure in Ganad Media with regard to the approvals for the issuance of payment vouchers. It therefore follows, going

by the learned Sessions Court Judge's reasoning, that PW20 could not have been telling the truth when she testified that the respondents gave the oral instructions. In other words PW20 had deliberately lied to the court.

[22] The credibility of a witness is primarily a matter for the trial court to decide. In this regard we are mindful of the principle that the appellate court will always be slow to interfere with findings of fact made by the trial court where such findings depended on the credibility of the witnesses. We must hasten to add however that it is also entrenched principle that the appellate court can and will interfere if the trial court's finding of fact is perverse and cannot be supported having regard to the evidence or is against the probabilities of the case. We do not find it necessary to cite any authority for this trite proposition of law.

[23] In finding PW20 to be an untruthful witness, it is clear to us that the learned trial judge's opinion was influenced and shaped by the following factors:

(a) PW20's evidence was not corroborated by independent evidence.

(b) PW20 was an interested witness.

(c) There were discrepancies in the evidence of PW20.

[24] In our view these factors taken cumulatively or individually are not justifiable reasons for finding PW20 to be deceitful. As to the first factor, we need only say that PW20 was not an accomplice or *particeps criminis*, whose evidence required independent corroboration. Even then the requirement of corroboration in such cases is more a matter of prudence rather than a strict requirement of law. Neither was PW20 a child witness. It was therefore wrong for the learned Sessions Court Judge to require corroboration when none is required by law.

[25] As for the second factor, it is our view that the learned Sessions Court Judge had given undue and unwarranted weight to the fact that PW20 was given a double promotion and triple pay. She surmised that this was a reward to PW20 for giving evidence against the respondents. With due respect to the learned Sessions Court Judge this is pure conjecture and should not have been made, particularly in the face of evidence that PW20's promotion was due to the outflow of key employees at the material time.

[26] In any case there is no law to say that the evidence of an interested witness must not be believed. Every witness who has taken oath to tell the truth must be presumed to be worthy of credit unless he proves or is shown by the evidence to be otherwise. Nothing can be more repulsive than for a witness to lie under oath in order that the accused may be convicted of the offence charged. Such witness is liable to contempt proceedings or to prosecution for perjury under s. 195 of the Penal Code. Be that as it may the court should only make such finding on any witness upon clear proof and on being satisfied that the witness had deliberately lied.

[27] As for the discrepancies and lapses of memory within and between the testimonies of PW20 and some of the other prosecution witnesses, especially PW1 and PW2, we find that they relate to insignificant and trivial matters such as the actual date PW20 was appointed the acquisition manager, the details pertaining to the preparation of the payment vouchers, the time and the date the oral instructions were given by the respondents and whether the respondents had given the oral instructions together or individually.

[28] Discrepancies such as these should be ignored as more often than not they are a result of honest mistakes or lapses in memory rather than falsehood. It must be remembered that the witnesses were recalling events that took place long before they were called to give evidence. Memories do fade with the passage of time and the courts do recognise human fallibility in recollection. Absolute unadulterated truth is not possible. Perfect testimony is an illusion, in fact a sure sign of concoction. It is only when a witness has demonstrably and undoubtedly lied on material points (and not just on any point) that his evidence must be treated with caution or discarded altogether.

[29] In determining whether a witness is telling the truth or otherwise on any material issue the best guide is for the court to see whether his testimony passes the test of probability. There may be discrepancies in his testimony or between his testimony and the testimonies of other witnesses or he may even have lied on one or two points, but if his testimony on a point that really matters, ie, a point that determines the guilt or otherwise of the accused is not inherently improbable and is consistent with the truth having regard to the totality of the evidence and the probabilities of the case, his evidence must be accepted unless for some other reason or reasons it is unsafe to be acted upon.

[30] It is the probative value of a witness's testimony that the court is concerned with. It is important to keep this in mind so as to avoid being sidetracked by trivialities and non-issues and in the process missing the trees for the forest. In the present case we found nothing inherently improbable in the testimony of PW20 that it was the respondents who orally instructed her to prepare the payment vouchers. There is nothing unusual about giving such oral instructions. The fact that stringent procedures were in place in Ganad Media for the approval and issuance of payment vouchers does not mean that the respondents could not issue the instructions orally, given their dominant positions as company directors.

[31] There is therefore no basis in our view for counsel in the courts below and before us to question why such important instructions were given orally and not in writing and why PW20 did not take down notes as to the date and nature of the instructions. In all likelihood PW20 would have done just that if indeed her intention was to frame up the respondents as alleged, with the written notes as proof of the respondents' wrongdoing.

[32] Contrary to the concurrent findings of the Sessions Court and the High Court, PW20's evidence does not stand alone. It is supported by the documentary evidence and the surrounding circumstances. For the payments to be made, someone in authority in Ganad Media must have given the instructions. Having regard to the totality of the evidence and the probabilities of the case, PW20 could not have been lying when she said that it was the two respondents who gave the oral instructions.

[33] The learned Sessions Court Judge being the trial judge was no doubt in a better position than us to judge PW20's credibility as a witness but in our view her rejection of PW20's evidence on the premise that the respondents had no opportunity to give the oral instructions due to the company's stringent procedure in approving payment vouchers is perverse and does not stand up to reason.

[34] We wish to reiterate that the burden on the prosecution is to prove its case beyond reasonable doubt, not beyond the shadow or flicker of a doubt. That is the degree of proof required and there is no dearth of authority on what constitutes "reasonable doubt". Unless this is properly understood there is the danger that in giving maximum evaluation to the evidence of the prosecution at the close of its case or in considering the evidence of the accused at the close of the defence case, a burden that is heavier and more onerous than what the law requires is demanded of the prosecution. Justice is not better served by acquitting a guilty man than it is to convict an innocent one.

[35] Perhaps we should reproduce the oft-quoted pronouncement of Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372 to better understand the correct burden that the law places on the prosecution:

> That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[36] For reasons aforesaid we found that both the Sessions Court and the High Court were wrong in finding that no *prima facie* case had been established against the respondents in respect of the three charges. In the result we set aside the order of acquittal and substituted it with an order that the defence be called.